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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

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Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANCHO VIEJO, LLC, Plaintiff, v. GALE A. NORTON, Secretary of the Interior, *et al.*, Defendants.	**Civil Action No.** **1:00-CV-02798 (ESH)**

MEMORANDUM OPINION

The arroyo toad[1] has been an endangered species since December 1994. The toad's habitat stretches from coastal Southern California, beginning in the Salinas River Basin in Monterey and San Luis Obispo Counties, to northern Baja California, Mexico. Chiefly nocturnal, a full-grown toad is two to three inches in length, and is distinguished by a V-shaped stripe across the top of its head between the eyes. Arroyo toads prefer riparian habitats with sandy streambeds; during breeding season, which typically runs from March to July, they hop up to 1.2 miles to a nearby stream or pool, where they lay and fertilize their eggs.

Plaintiff Rancho Viejo seeks to construct a housing development in northern San Diego County. Before it could develop the land, plaintiff was required to comply with certain provisions of the Endangered Species Act of 1973, 16 U.S.C. § 1531 ("ESA"). After a survey, defendants discovered that plaintiff's development would likely disturb the habitat of a group of arroyo toads in the area, in violation of

[1] *Bufo microscaphus californicus.*

the ESA, and proposed a lawful alternative under the Act. Rather than agreeing to the alternate plan, plaintiff filed this lawsuit. Rancho Viejo claims that the application of the ESA is unconstitutional because the federal government does not have the authority under the Commerce Clause to regulate private lands in order to protect the arroyo toads on those lands, because these toads live entirely within California. This argument is not a novel one. It has been considered and uniformly rejected by several circuit courts, including the D.C. Circuit, and several district courts.[2] Plaintiff has not provided any valid basis upon which to conclude that the holding of these cases has been undermined by recent Supreme Court jurisprudence interpreting Congress' power under the Commerce Clause. Accordingly, plaintiff's challenge to the ESA must fail, and summary judgment will be entered on behalf of defendants.

BACKGROUND

I. Statutory Framework

Congress enacted the ESA in 1973 based on a finding that many of the species threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). To protect these species, the ESA provides for the listing of "endangered" and "threatened" species. *Id.* § 1533. Once a species is listed, specific substantive and procedural protections are accorded to that species and its habitat. *Id.* § 1536(a)(2).

Plaintiff challenges the application of § 9 of the ESA. Section 9(a)(1) forbids any person to "take any [endangered

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[2] *See, e.g., National Association of Home Builders v. Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000) *United States v. Bramble,* 103 F.3d 1475 (9th Cir. 1997); *Building Industry Association of Superior California v. Babbitt,* 979 F. Supp. 893 (D.D.C.1997); *Shields v. Babbitt,* No. MO-99-CA-040, Order (W.D. Tex. July 12, 2000).

or threatened] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). Under the statute, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The ESA provides for civil and criminal penalties, including imprisonment, for violations of § 9(a)(1). Plaintiff also disputes the application of § 7(a)(2), which prohibits federal agencies from taking any action that is likely to "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2). To achieve this objective, the ESA requires the agency to consult with the relevant federal wildlife agency whenever a federal action may affect an endangered or threatened species. *E.g.*, 50 C.F.R. § 402.14(a). If the action is likely to jeopardize the continued existence of the species or adversely modify its habitat, the wildlife agency will offer a "reasonable and prudent alternative" to the action. *E.g.*, 50 C.F.R. § 402.02.

II. Factual Background

Plaintiff Rancho Viejo is a California real estate development company that seeks to construct 280 homes on property that it owns in northern San Diego County. Plaintiff plans to use 52 acres of its 202-acre property as a site for the homes. Rancho Viejo intends to designate an additional 77 acres and portions of the adjacent Keys Creek as a borrow area, proposing to excavate approximately six feet of soil off the surface and transport it to the 52-acre housing site.

On May 21, 1999, plaintiff applied for a permit under § 404 of the Clean Water Act, 33 U.S.C. § 1344, from the U.S. Army Corps of Engineers (the "Corps") for authorization to conduct work. Pursuant to § 7 of the ESA, the Corps requested a formal consultation with the U.S. Fish and Wildlife Service (the "Service"), because the Corps determined that the plaintiff's project might affect the arroyo toad, having

confirmed the presence of arroyo toads by surveys in the Keys Creek area, on and adjacent to the Rancho Viejo project site.

In May 2000, plaintiff began ground disturbing activities in the 77-acre borrow area, including the excavation of a trench and construction of a fence approximately 50 to 100 feet upland from vegetation along the bank of Keys Creek and running parallel to the stream. Investigation by both parties has confirmed the presence of arroyo toads on the upland side of the fence. According to the Service, this fence has prevented and may continue to impede movement of the toads between their upland habitat and their breeding grounds in the creek.[3] The Service therefore sent a letter dated May 22, 2000, warning plaintiff that the construction and continued existence of the fence constituted an "illegal take" of the arroyo toad under the ESA and that plaintiff could potentially be subjected to criminal and civil liability under § 9 of the ESA. Nonetheless, plaintiff refused to remove the fence. On May 24, 2000, San Diego County determined that plaintiff's grading permit had expired and issued a Notice of Violation and Stop Work Order. San Diego County has not issued a renewed grading permit, and Rancho Viejo currently has no valid grading permit for either the 52-acre site or the 77-acre borrow area.

In August 2000, pursuant to a § 7 formal consultation, the Service issued a biological opinion which found that the proposed excavation would result in a "taking" of arroyo toads that have traveled upland from the breeding areas of Keys Creek. Under § 7, the Service proposed a "reasonable and prudent alternative" to plaintiff's plan, calling for the re-

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[3] Plaintiff's expert, a wildlife biologist, disputes this point. He contends that because the upstream portion of the fence is not buried, it will allow for the passage of toads. (Pl. Motion for Summary Judgment, Ex. B, Affidavit of Ruben Ramirez ¶ 2.) Because this point is not material to whether the ESA is constitutional as applied to plaintiff, the Court need not resolve this discrepancy.

trieval of soil from off-site sources instead of the 77-acre upland borrow area that is the toad's habitat. Adherence to this "reasonable and prudent alternative" would enable Rancho Viejo to obtain the § 404 permit from the Corps. Instead, plaintiff filed this lawsuit in November 2000. Both sides have moved for summary judgment.

LEGAL ANALYSIS

I. Ripeness

The parties are in agreement that this dispute can be resolved by summary judgment, and that there are no genuine issues of material fact that need to be resolved. However, defendants argue that this action must be dismissed because it is not ripe for review. "Before a court may consider the merits of a case, the court must determine whether the case is ripe for review so that it has subject-matter jurisdiction." *Wyoming Outdoor Council v. Dombeck,* 2001 WL 359526, at *6 (D.D.C. March 27, 2001). "A case is ripe if the interests of the court and agency in postponing review until the question arises in some more concrete and final form are outweighed by the interest of those who seek relief from the challenged action's immediate and practical impact upon them." *Aulenback, Inc. v. Federal Highway Admin.,* 103 F.3d 156, 166-67 (D.C. Cir. 1997) (internal quotations omitted). The Supreme Court has established a two-pronged test for ripeness that requires a court to evaluate 1) the fitness of the issues for judicial decision and 2) the hardship to the parties of withholding court decision. *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967)); *Cronin v. FAA,* 73 F.3d 1126, 1131 (D.C. Cir. 1996).

"Under the fitness prong of the test, we inquire into whether the disputed claims raise purely legal, as opposed to factual, questions and whether the court or the agency would benefit from postponing review until the policy in question has sufficiently crystallized." *Florida Power & Light Co. v.*

EPA, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (internal quotations and citations omitted). Here, the parties agree that the disputed claims are purely legal but disagree as to whether the policy in question has sufficiently crystallized.

Defendants argue that this case is not ripe because the claims "rest[ ] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). However, federal actors have already applied the ESA to the plaintiff by preventing Rancho Viejo from obtaining necessary permits and threatening it with criminal prosecution and civil liability.

Defendants' application of the ESA has prevented Rancho Viejo from obtaining two permits that it needs to begin construction: 1) the Corps permit to borrow fill from a portion of its property, and 2) a renewal grading permit from San Diego County. (Joint Stipulation of Facts ¶¶ 12, 14.) The Corps was unable to issue a permit because § 7 of the ESA required it to consult with the Service after concluding that the proposed development might affect the arroyo toad. *Id.* ¶ 5. In response, the Service issued a biological opinion requiring Rancho Viejo to obtain fill from off-site sources in order to obtain this necessary permit. *Id.* ¶ 14. Therefore, defendants' application of the ESA has prevented plaintiff from obtaining the § 404 permit. In addition, plaintiff has presented sufficient evidence that San Diego County has withheld a renewal grading permit at least in part because plaintiff lacks necessary federal approval. (Plaintiff's Combined Reply and Opposition, Exs. F-H.) Moreover, upon expiration of the previous grading permit, San Diego County issued a notice of violation and stop work order. (Joint Stipulation of Facts ¶ 12.) Rancho Viejo's inability to obtain the necessary permits and continue work indicates that the legal issues have crystallized.[4]

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[4] Defendants cite *New Hanover Township v. Corps of Engineers*, 992 F.2d 470 (3d Cir. 1993), which held that a claim concerning a Corps §

In addition, plaintiff has built a fence which, according to the Service, may constitute an "illegal take" of the arroyo toad. The Service wrote plaintiff a letter to that effect, and threatened plaintiff with potential criminal and civil liability under § 9 of the ESA. The Service requested that plaintiff remove the fence and indicated that it may seek an enforcement action. Defendants argue that this letter does not support plaintiff's claim of ripeness because it does not impose any binding legal obligations. However, plaintiff has demonstrated "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *KVUE, Inc., v. Moore,* 709 F.2d 922, 928 (5th Cir. 1983) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U .S. 289, 298 (1979)). In addition, "it is not necessary that the plaintiff expose himself to actual arrest or prosecution to be entitled to challenge the statute ...." *KVUE,* 709 F.2d at 928 (quoting *Steffel v. Thompson,* 415 U.S. 452, 459 (1974)). Rather, the threat of criminal and civil liability is sufficient. *See Steffel,* 415 U.S. at 459 (holding that plaintiff's claim was ripe because he had been warned twice and threatened with arrest).

In addition to showing that its claim is fit for review, plaintiff has demonstrated that it will suffer hardship if the court delays judicial decision. Plaintiff must demonstrate a hardship that is "immediate, direct, and significant." *Cronin,* 73 F.3d at 1133. Defendants argue that the harm feared by plaintiff is only speculative. However, plaintiff is unable to proceed with its construction because of the delay in the permitting process. Plaintiff has also been threatened with criminal prosecution.[5] Because plaintiff has satisfied both

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404 permit was not ripe because a township permit was also necessary for the project to go forward. In *New Hanover,* however, "the Corps' decision ha[d] no immediate effect on the Township." *Id.* at 472. Here, in contrast, San Diego County is awaiting federal authorization in accordance with the ESA in order to issue the renewal grading permit.

[5] Defendants argue that the Service's letter to Rancho Viejo indicating that it is in violation and may suffer criminal and civil liability does not have the status of law or establish any binding legal requirements because

prongs of the ripeness test, its claim is appropriate for judicial review.

II. Commerce Clause

A. Legal Backdrop

The United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States ...." U.S. Const. Art. I, § 8, cl. 3. The regulated activity at issue in this case is the "taking" of the arroyo toad, as defined in § 9 of the ESA, in conjunction with plaintiff's construction project. Plaintiff argues that under *United States v. Lopez,* 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act unconstitutional because possession of gun in local school zone is not economic activity that substantially affects interstate commerce), and *United States v. Morrison,* 529 U.S. 598 (2000) (holding that the civil remedy provision of Violence Against Women Act did not regulate activity that substantially affected interstate commerce), the ESA as applied to the facts of this action is unconstitutional. Plaintiff contends that the ESA cannot apply to protect the arroyo toad because the regulated activity is not commercial in nature and is entirely intrastate, thus falling outside the scope of Congress' power under the Commerce Clause.

This question has already been decided in this Circuit. In *National Association of Home Builders v. Babbitt,* 130 F.3d

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it does not constitute final agency action. *See FTC v. Standard Oil Co.,* 449 U.S. 232 (1980) (holding that the FTC's issuance of a complaint did not constitute final agency action); *Cronin v. FAA,* 73 F.3d 1126 (D.C. Cir. 1996) (holding that an action challenging the Federal Aviation Administration's regulations was not ripe because the agency's procedures had not been finalized). However, whether defendants' action is "final" in the context of the Administrative Procedure Act, 5 U.S.C. § 701, is not relevant to this case. Plaintiff's claim is that the application of the ESA is unconstitutional—not that defendants have violated the APA. As the Western District of Texas noted in a similar case, "Either it is or it is not constitutional for § 9 to be applied to [plaintiff], and his civil and criminal liability ... directly hinges on the Court's determination." *Shields v. Babbitt,* No. MO-99-CA-040, Order at 13 (W.D. Tex. July 12, 2000).

1041 (D.C.Cir.1997) [hereinafter *NAHB*], the Court rejected the argument that the ESA could not be applied to a species that lived entirely within one state. In that case, the Service had determined that a proposal to redesign an intersection near a hospital might cause a "take" of the Delhi Sands Flower-Loving Fly, an endangered species that lived only in California. In this post-*Lopez* challenge, the Court upheld the ESA—and specifically the "take" provision of § 9(a)(1)—as within Congress' Commerce Clause power. Other courts have also addressed this issue and have consistently upheld the ESA as constitutional under the Commerce Clause. *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000) (upholding a regulation limiting the "taking" of red wolves on private land, issued pursuant to the ESA); *United States v. Bramble,* 103 F.3d 1475 (9th Cir. 1997) (importance of the eagle to interstate commerce); *Shields v. Babbitt,* No. MO-99-CA-040, Order (W.D. Tex. July 12, 2000) (upholding the ESA as applied to a local aquifer that was home to a variety of endangered fish and amphibians).

The Supreme Court has recognized three broad categories of activity that Congress may regulate under the Commerce Clause. *Lopez,* 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted). Both parties focus on only the third of these categories.[6]

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[6] Both plaintiff and defendants discuss whether this case could be addressed under a "channels of interstate commerce" analysis. In *NAHB,* Judge Wald, writing for the majority, held that the "take" provision of the ESA was related to the use of the channels of interstate commerce. "First,

B. Substantially Affects Interstate Commerce

This Court is, of course, bound by *NAHB,* which upheld an application of the "take" provision of the ESA on the grounds that the regulated activity substantially affected interstate commerce. The parallels between *NAHB* and this case are unmistakable. Plaintiffs in *NAHB* planned to construct a new hospital and redesign an intersection to improve emergency access to the hospital. However, pursuant to the ESA, the Service informed plaintiffs that redesigning the intersection would likely lead to a "taking" of the Delhi Sands Flower Loving Fly, because it would encroach on the migration corridor the Service had set up for the fly to travel from one protected area to another. *NAHB,* 130 F.3d at 1044. Similarly, the excavation of Rancho Viejo's property would likely result in the "taking" of toads that have dispersed from the breeding areas of Keys Creek to burrows in the upland areas adjacent to the creek. The Delhi Sands Fly exists only within an 8- to 10-mile radius in a single state; the arroyo toads in this action travel up to 1.2 miles entirely within California. The application of the "taking" provision to the plaintiffs and the fly in *NAHB* is virtually identical to its application to Rancho Viejo and the arroyo toad.

It is unclear whether challenges to the constitutionality of a statute under the Commerce Clause are analyzed under the usual rational basis standard, *see NAHB,* 130 F.3d at 1051, or under the more specific guidelines set forth in *Lopez* and *Morrison.* In those cases, the Supreme Court articulated four

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the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority to keep the channels of interstate commerce free from immoral and injurious uses." *NAHB,* 130 F.3d at 1046. Neither of the other two judges on the panel, however, joined with Judge Wald in this portion of her opinion, leaving open the question of whether the ESA regulates the use of a channel of interstate commerce. This Court, however, need not address this issue because the ESA as applied in this action satisfies the "substantially affects" test.

factors to examine in determining whether a statute substantially affects commerce. The Court need not resolve which standard is determinative, however, because the "taking" provision of the ESA as applied substantially affects interstate commerce under either approach.

Rational basis review requires this Court to determine "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *NAHB,* 130 F.3d at 1052 (quotations and citations omitted). As the Court in *NAHB* noted, there are two bases on which Congress could rationally conclude that the intrastate activity regulated by § 9 of the ESA substantially affected interstate commerce. First, the Act protects biodiversity. *NAHB,* 130 F.3d at 1052. "The elimination of all or even some of the endangered species would have a staggering effect on biodiversity ... and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species." *Id.; see id.* at 1058 (Henderson, J., concurring) ("I believe that the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."). Second, it controls the effects of interstate commerce. Because states will be "motivated to adopt lower standards of endangered species protection in order to attract development," Congress has the power to regulate in order to "prevent destructive interstate competition." *Id.* at 1054-55.

Lopez and *Morrison,* however, appear to provide an alternate standard of review for cases such as this. There, the Supreme Court set forth a four-factor test for determining whether a regulated activity substantially affects commerce. First, a court must consider whether the statute "has [ ] to do with" commerce or some sort of economic enterprise. *Morrison,* 529 U.S. at 610. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison,* 529 U.S. at 613. Plaintiff argues that after *Morrison, NAHB* no longer controls, because *Morrison* made

clear that the activities regulated by the ESA in this case are not economic in nature. The Court disagrees for two reasons. First, the Supreme Court limited its holding in *Morrison* to prevent Congress from regulating "noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *Id.* at 617. The ESA does not regulate "violent, criminal conduct." Rather, it regulates activities that threaten endangered species, which is a subject traditionally within the federal government's province. *See Gibbs,* 214 F.3d at 497 ("Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species.")[7] Thus, this is not the type of action that falls within the holding of *Morrison.*[8]

Additionally, the regulated activity in question is economic in nature. In evaluating a connection to economic or commercial activity, "economic activity must be understood in broad terms," and the Court must focus on the actual activity being regulated—in this case the building of the homes. *Gibbs,* 214 F.3d at 491-92. For example, in *Gibbs,* farmers were "taking" red wolves because they feared that the animals posed a risk to their livestock and crops. The Court found that because these "takings" focused on protection of

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[7] *Gibbs* was decided after *Morrison,* and the Fourth Circuit explicitly distinguished the subject matter of the ESA from that of the statute at issue in *Morrison.* "*Lopez* and *Morrison* properly caution that States should receive judicial protection from unconstitutional federal encroachments on state matters. Yet endangered wildlife regulation has not been an exclusive or primary state function. In this way the anti- taking regulation is distinctly unlike ... the [Violence Against Women Act that was at issue in *Morrison,* which] impeded on family law and criminal matters of traditional state concern." *Gibbs,* 214 F.3d at 500.

[8] As Judge Henderson observed in *NAHB,* "[N]either the Supreme Court nor any circuit court has used *Lopez* to strike down an attempted regulation outside the criminal arena." *NAHB,* 130 F.3d at 1060 n. 7 (Henderson, J., concurring). That statement remains true today, for if *Morrison* ever addressed the issue of civil liability, it arose from "violent, criminal conduct." 529 U.S. at 599.

commercial and economic assets, the regulated activity was economic. *Id.* at 492. In *Shields,* plaintiffs sought to pump a local aquifer to irrigate their crops. This, in turn, altered the aquatic habitat of the aquifer, causing "takes" of a number of fish, amphibian, and plant species that lived there. In holding that the ESA as applied substantially affected interstate commerce, the Court found that pumping water to irrigate crops was an economic activity. *Id.* at 30. Here, Rancho Viejo's construction of 280 homes is plainly an economic activity. Plaintiff seeks to distinguish building the homes from grading the land, and argues that only the former is economic in nature, while the latter is being regulated by the ESA. However, because the grading process is a necessary precursor to building the homes and is part of the same overall construction process, both steps are inextricably intertwined and constitute an economic activity.

In addition, regulation of the arroyo toad itself is economic in nature because "[e]xtinction of [a species] would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity ...." *Bramble,* 103 F.3d at 1481. Furthermore, "[a] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species ...." *Id.* (quoting *Palila v. Hawaii Dep't of Land & Natural Resources,* 471 F.Supp. 985, 994-995 (D.Haw.1979) (upholding ESA under Commerce Clause as applied to intrastate Palila bird)). Defendants have provided evidence that professors and students have traveled and plan to continue to come from other areas of the United States into California to study and observe the arroyo toad. Moreover, like other endangered species, the arroyo toad has potential commercial value, including invaluable contributions to the genetic pool.

In response, plaintiff appears to argue that either Con-

gress or this Court is required to make a determination as to whether each individual species "substantially affects interstate commerce," rather than to accept Congress' more general finding that the preservation of species in the aggregate is crucial to the commerce of this Nation. Given that approximately 13 to 30 million different species now exist (National Wildlife Federation Brief at 4), plaintiffs' argument must be rejected as contrary to basic scientific knowledge, *see NAHB,* 130 F.3d at 1058 (Henderson, J., concurring) ("The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists."), as well as the law as set forth in *Lopez* and in *NAHB.*

> In evaluating whether ESA section 9(a)(1) is a regulation of ... activity that substantially affects interstate commerce, we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species. As the *Lopez* Court explained, "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence." If a statute regulates a class of activities within reach of the federal power, the courts have no power to excise, as trivial, individual instances of the class. Because section 9(a)(1) of the ESA regulates a class of activities—takings of endangered species—that is within Congress' Commerce Clause power under ... [the] third *Lopez* categor[y], application of section 9(a)(1) to the fly is constitutional.

NAHB, 130 F.3d at 1046 (quoting *Lopez,* 514 U.S. at 558) (other internal quotations and citations omitted).

Second, the Court must consider whether the statute in question has an express jurisdictional element that restricts its application to activities that have an explicit connection

with interstate commerce. *Morrison,* 529 U.S. at 611-12. Although the "take" provision of the ESA contains no jurisdictional element, such a provision is found in §§ 9(a)(1)(E) and 9(a)(1)(F). The statute states in relevant part:

> (1) with respect to any endangered species of fish or wildlife ... it is unlawful for any person [to -]
>
> (B) take any such species into, or export any such species from the United States; ...
>
> (E) deliver, receive, carry, transport, or ship, in interstate or foreign commerce, any such species and in the course of a commercial activity, any such species;
>
> (F) sell or offer for sale in interstate or foreign commerce any such species; ....

16 U.S.C. § 1538(a)(1). In addition to prohibiting the interstate transport of endangered species, as explained below, one of the primary reasons that Congress enacted the ESA was to ensure the continuing availability of a wide variety of species to interstate commerce. Whether a species lives entirely within a single state is irrelevant to that larger purpose. The jurisdictional grant of § 9, combined with Congress' purpose in enacting the ESA, supports a finding that the Act is explicitly connected to interstate commerce. *Shields,* at 26-27.

Third, the court must examine whether the statute or the legislative history contains express congressional findings regarding its effects upon interstate commerce. *Morrison,* 529 U.S. at 612. The legislative history of the ESA is crystal clear: Congress repeatedly emphasized that it was enacting the statute in order to protect a commercial resource. Committee Reports on the ESA recognized the potential for future commerce with respect to endangered species.

The House Report explained:

> As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure

> for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable ....
>
> ....
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> ....
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R. Rep. No. 93-412, at 4-5 (1973). Similarly, the Senate Report relating to the precursor to the ESA noted:

> From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case, businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool ... available for use by man in future years. Since each living species and subspecies has developed in a

> unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. Rep. No. 91-526, at 3 (1969), *quoted in NAHB,* 130 F.3d at 1050-51. Because the legislative history explicitly sets forth Congress' reasoning in enacting the ESA, the third factor weighs heavily in support of upholding the Act.

Finally, the court must determine whether the relationship between the regulated activity and interstate commerce is attenuated. *Morrison,* 529 U.S. at 612. The Court finds that it is not. We do not have to "pile inference upon inference," *Lopez,* 514 U.S. at 567, to conclude that the "taking" of endangered species has a substantial effect on interstate commerce. Plaintiff argues that its potential "taking" of arroyo toads would only have a de minimis effect on interstate commerce. However, "because biodiversity has a real, substantial, and predictable effect on both the current and future interstate commerce, 'the de minimis character of individual instances arising under [the ESA] is of no consequence." *NAHB,* 130 F.3d at 1053 n. 14 (quoting *Lopez,* 514 U.S. at 558). Moreover, "the effect on commerce must be viewed not from the taking of one [animal], but from the potential commercial differential between an extinct and a recovered species." *Gibbs,* 214 F.3d at 497.

Plaintiff raises two other arguments in support of its position. First, it contends that NAHB is no longer controlling after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) [hereinafter *SWANCC*]. In *SWANCC,* the Corps had interpreted § 404(a) of the Clean Water Act to confer federal authority over an abandoned sand and gravel pit. The Supreme Court, however, held that the Corps had exceeded its authority under the Clean Water Act. *Id* . at 162.

But the Court in *SWANCC* resolved the issue on statutory grounds, thus avoiding "the significant constitutional and federalism questions raised ...." *Id.* at 174. And dicta regarding the constitutionality of the statute only reaffirmed that a court must focus on the "precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173. *SWANCC* therefore does nothing to bolster plaintiff's argument.

Finally, plaintiff contends that the ESA as applied in this case is unconstitutional because Congress is exerting authority in the area of land use, where states traditionally have had power. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison,* 514 U.S. at 617-18. "It is well established, however, that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs,* 214 F.3d at 500. Therefore, the regulation of endangered species is easily distinguishable from the situations in *Lopez* or *Morrison,* where the Supreme Court found that Congress assumed authority in areas of traditional state concern: general police power, family law, and crime. As recognized by the Fourth Circuit, "the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation," *Gibbs,* 214 F.3d at 500, and the holdings in *Lopez* and *Morrison* do not suggest otherwise.

The observation of Judge Paul Friedman of this Court remains particularly apt, for it underscores the illogic of plaintiff's position in this case.

> According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce clause to protect it. But when the same species becomes more scarce and its population reduced to a single state, Congress's hands are suddenly tied. This Court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such im-

portant economic, scientific and environmental dimensions.

Building Industry Association of Superior California v. Babbitt, 979 F. Supp. 893, 908 (D.D.C. 1997). This Court finds this analysis to be compelling, and is unwilling to conclude, as argued by plaintiff, that this Circuit's opinion in *NAHB* has been eviscerated by the Supreme Court's decision in *Morrison.*

CONCLUSION

For the reasons stated above, plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment is granted. A separate order accompanies this opinion.

/s
ELLEN SEGAL HUVELLE
United States District Judge

Dated: Aug. 20, 2001.